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Pursuant To
Government Code
Section 6103

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City of Burbank

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

CHRISTOPHER LEE DUNN,

Case No. BC 417928

Plaintiff,

**THE CITY OF BURBANK'S NOTICE OF
MOTION AND MOTION FOR SUMMARY
JUDGMENT OR, IN THE ALTERNATIVE,
SUMMARY ADJUDICATION;
MEMORANDUM OF POINTS AND
AUTHORITIES; INDEX OF EXHIBITS**

v.

BURBANK POLICE DEPARTMENT,
CITY OF BURBANK, and DOES 1
Through 100, Inclusive,

*[Declarations of Kristin A. Pelletier, Timothy
Stehr, Gerardo Misquez, Victor Lewandowski,
Michael Webb, Charles Koffman and Daniel
Baker filed concurrently herewith]*

Defendants.

Date: July 26, 2010
Time: 8:30 a.m.
Dept. 31

TO PLAINTIFF CHRISTOPHER LEE DUNN AND HIS COUNSEL OF RECORD:

PLEASE TAKE NOTICE THAT on July 26, 2010, at 8:30 a.m., or as soon thereafter as
may be heard before Hon. Alan S. Rosenfield in Department 31 of the above-entitled Court
located at 111 North Hill Street, Los Angeles, California, defendant City of Burbank (the "City")

LA #4825-5442-7654 v1

- 1 -

CITY OF BURBANK'S MOTION FOR SUMMARY JUDGMENT

will and hereby does bring this motion for summary judgment or, in the alternative, summary adjudication in favor of the City on each of the five causes of action¹ in plaintiff Christopher Lee Dunn's First Amended Complaint ("FAC"). Summary judgment or summary adjudication of the five claims in the FAC is warranted because: (1) plaintiff was fired for legitimate non-discriminatory reasons based on evidence uncovered by, and the conclusion of, third-party law enforcement agencies (the Culver City Police Department, the Los Angeles County Sheriff's Department, and the Los Angeles County District Attorney's Office) that he, among other things, tipped off an informant to an investigation of her by the Culver City Police Department, which caused him to be placed on the "*Brady* list" maintained by the Los Angeles County District Attorney's Office and caused that Office to conclude that he was worthless as a law enforcement witness; (2) plaintiff engaged in but failed to exhaust administrative remedies; (3) the City is immune from liability for its internal investigation of plaintiff; (4) plaintiff's harassment claims are barred by the statute of limitations and seek redress for conduct that was neither severe nor pervasive nor reported to the City; (5) plaintiff did not engage in a protected act to give rise to a retaliation claim and there is no nexus between any such claimed act and any alleged retaliatory action; (6) plaintiff has no evidence of any discriminatory or retaliatory animus by the City employees involved in his termination; (7) plaintiff has not and cannot present any evidence of a violation of his rights under the Public Safety Officers' Procedural Bill of Rights Act, *Government Code* §§ 3300 et seq. ("POBRA"), or of a timely government claim that includes such an allegation.

Summary adjudication in favor of the City and against plaintiff on each of the five causes of action in FAC is warranted on each of following issues:

1. There is no dispute of material fact that the City is entitled to judgment on the first cause of action for Discrimination in Violation of *Government Code* § 12940(a) and (c) because plaintiff cannot produce a triable issue of material fact that the City's reasons for his termination

¹ Due to an apparent typographical error, the FAC goes from the "FOURTH CAUSE OF ACTION" to one labeled as the "SIXTH CAUSE OF ACTION." There are only five causes of action in the FAC.

are false or a pretext, and because plaintiff's claims are barred by failure to exhaust administrative remedies, immunity, or the statute of limitations. [UF 1-84.]²

2. There is no dispute of material fact that the City is entitled to judgment on the second cause of action for Harassment in Violation of Government Code § 12940(a) and (j) because the subject actions are barred by the statute of limitations, because the alleged harassment was neither severe nor pervasive as a matter of law, and because plaintiff did not complain to the City about any alleged harassment. [UF 85-107.]

3. There is no dispute of material fact that the City is entitled to judgment on the third cause of action for Retaliation in Violation of Government Code § 12940(h) because plaintiff cannot produce a triable issue of material fact that the City's reasons for his termination are false or a pretext, because plaintiff's claims are barred by failure to exhaust administrative remedies, immunity, or the statute of limitations, because plaintiff did not engage in any statutorily protected conduct, and because there is no nexus between any such claimed conduct and the asserted retaliatory acts by the City. [UF 108-192.]

4. There is no dispute of material fact that the City is entitled to judgment on the fourth cause of action for Failure to Take Steps to Prevent Discrimination and Harassment in Violation of *Government Code* § 12940(j)(1), and (k) because plaintiff cannot produce a triable issue of fact to support a claim for discrimination, harassment, or retaliation. [UF 193-292.]

5. There is no dispute of material fact that the City is entitled to judgment on the sixth cause of action for Violations of the Public Safety Officers' Procedural Bill of Rights Act because plaintiff cannot present a triable issue of material fact showing a violation of any of his rights under that Act, or produce a timely government claim asserting these alleged facts or legal theory. [UF 293-303.]

6. The City is entitled to summary adjudication in its favor on one or more causes of action pursuant to its eighteenth affirmative defense of the statute of limitations. [UF 304-309.]

² Citations to the Separate Statement of Undisputed Facts will be labeled as "UF ____".

1 7. The City is entitled to summary adjudication in its favor on one or more causes of
2 action pursuant to its eleventh affirmative defense of failure to exhaust administrative remedies.
3 [UF 310-313.]

4 8. The City is entitled to summary adjudication in its favor on one or more causes of
5 action actions pursuant to its nineteenth affirmative defense of privileges and immunities. [UF
6 314-331.]

7 This motion is based upon this notice of motion and motion, the attached memorandum of
8 points and authorities, the accompanying Separate Statement of Undisputed Material Facts, the
9 accompanying Declarations of Kristin A. Pelletier, Timothy Stehr, Gerardo Misquez, Victor
10 Lewandowski, Michael Webb, Charles Koffman and Daniel Baker, and the exhibits thereto, the
11 pleadings and other records on file with this Court, and such further evidence and argument as the
12 Court may choose to consider.

13
14 Dated: May 12, 2010

Burke, Williams & Sorensen, LLP
Kristin A. Pelletier

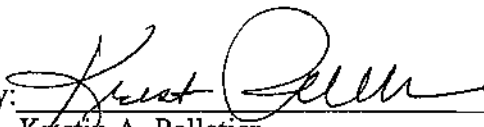
15
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17 By: 
18 Kristin A. Pelletier
19 Attorneys for Defendant
20 City of Burbank
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION AND SUMMARY**

3 In 2007, three independent law enforcement agencies—the Culver City Police
4 Department, the Los Angeles County Sheriff's Department ("LASD"), and the Los Angeles
5 County District Attorney's Office (the "DA's Office") investigated then-Burbank Police
6 Detective Christopher Dunn ("Dunn") and concluded that he warned one of his drug dealer
7 informants that she was about to be busted by Culver City. This egregious misconduct caused the
8 DA's Office to place Dunn on its "*Brady* list" of officers whose acts of moral turpitude had to be
9 disclosed to criminal defendants, thereby rendering him useless as a law enforcement officer and
10 prosecution witness. Dunn then had the audacity to file a lawsuit contending that his termination
11 was somehow discriminatory and that he had been subjected to race-based harassment more than
12 two years previously about which he never complained. Dunn has no evidence that his
13 termination was based on his race or was in retaliation for complaints he admittedly never made;
14 nor does he have any evidence that the conclusions of multiple law enforcement agencies that he
15 engaged in misconduct were a mere pretext for a race-based discharge. Moreover, his after-the-
16 fact harassment claims are trivial and long barred by the statute of limitations. For these reasons,
17 the City of Burbank's motion for summary judgment must and should be granted.

18 **II. STATEMENT OF FACTS**

19 Dunn is a former officer of the Burbank Police Department ("BPD"), who is allegedly half
20 Japanese. [UF³ 1.] In November of 2003, Dunn was assigned to the Special Enforcement Detail
21 of the BPD. [UF 3.] This was a specialized unit that supported the investigation division of the
22 BPD in the investigation of various crimes. [UF 3.] In approximately July 2006, Dunn was
23 promoted to the rank of detective and transferred into the Vice/Narcotics Unit. [UF 4.]

24 **A. Culver City's Operation Against GD**

25 In his work as a detective in Vice/Narcotics, Dunn became the handler for an informant
26 for the BPD, "GD." [UF 5.] On Sunday March 11, 2007, the Culver City Police Department
27

28 ³ Citations to paragraphs in the City's Statement of Undisputed Material Facts will be to "UF ____."

1 ("CCPD") arrested an entertainer by the name of "JW" for drug possession.⁴ JW implicated GD
2 as a drug dealer who sold "pounds" of drugs. CCPD Detective Charles Koffman began an
3 investigation of GD. He ran GD's name through LA CLEAR, a multi-jurisdictional law
4 enforcement database, where GD was registered as an informant for Dunn at BPD. [UF 6-7.]

5 LA CLEAR notified Dunn of Det. Koffman's call at 1:59 p.m.⁵ [UF 8.] Dunn, who was
6 at a park attending a family picnic, checked his messages at 2:03 p.m., then called Det. Koffman
7 at 2:04 p.m. [UF 9.] Det. Koffman told Dunn that CCPD was preparing to conduct a "controlled
8 buy" involving GD (*i.e.*, to have their informant purchase drugs from GD while they monitored
9 the transaction). According to Det. Koffman, he discussed some of the details of the operation
10 with Dunn, including that JW, his informant, was in the entertainment business. [UF 10.] Dunn
11 downplayed the likelihood that GD was actually dealing to such an extent that Det. Koffman
12 ultimately asked if Dunn wanted him to not arrest GD. Dunn replied "No I wish you wouldn't."
13 [UF 11.] Det. Koffman next asked "Let me get this straight. You know your informant is selling
14 narcotics and you don't want me to arrest her." Dunn responded "Yes." [UF 12.]⁶

15 Dunn next called his supervisor, Sgt. Jose Duran, at 2:12 p.m.. [UF 13.] Dunn told Sgt.
16 Duran about CCPD's investigation of GD. Sgt. Duran told Dunn to tell CCPD that if they had
17 information that GD was dealing drugs, they should proceed with their investigation. [UF 14.]
18 Meanwhile, Det. Koffman called his supervisor, Sgt. Webb, as he was concerned that Dunn's
19 request not to proceed against GD might be illegal. [UF 15.] Sgt. Webb called Dunn at 2:17 and
20 2:18 p.m., but had to leave a voicemail message. [UF 16.]

21 Immediately after talking to Sgt. Duran, Dunn called GD at 2:15 pm, but the call did not
22 connect. [UF 17.] At 2:16 pm, Dunn called GD using his father's cell phone, but did not include
23 the area code. [UF 18.] At 2:17 pm, he called GD with the full number on his father's phone and
24 the two talked for three minutes. [UF 19.] Beginning at 2:19 pm, Dunn called Det. Koffman

25
26 ⁴ Privileges with respect to the identities of their informants are held by Burbank and Culver City, the latter
of which does not wish to waive its privilege. The City will identify both of the informants by initials only.

27 ⁵ The best summary of calls for the Court's easy reference is at Exhibit W to Sgt. Misquez' Declaration.

28 ⁶ Dunn disputes this portion of his conversation with Det. Koffman. However, that is beside the point for
purposes of this Motion. Here, what matters is what Det. Koffman told the BPD about Dunn as it relates
to the BPD's motive to terminate Dunn's employment.

1 numerous times. [UF 20.] He called Sgt. Webb at 2:25 pm and indicated, per Sgt. Duran, that if
2 GD was dealing drugs, CCPD should proceed with its operation against her. [UF 21.] At 2:46
3 and 2:48 pm, Dunn called GD again, this time using his sister's phone, talking for two minutes
4 each time. [UF 22.] Dunn's supervisor, Sgt. Duran, would later tell investigators that he was
5 surprised that Dunn called GD on March 11 and could offer no explanation for why he would do
6 so. [UF 23.] Dunn did not tell anyone at BPD or CCPD that he had spoken with GD or that GD
7 was aware CCPD was coming after her. [UF 24.]

8 Nevertheless, GD's contemporaneous actions show she had indeed been warned.
9 Immediately following Dunn's calls to her, GD telephoned her sister, Nancy Mercado. [UF 25.]
10 As Mercado would later report to BPD⁷, GD told Mercado that "Chris" had just called, and
11 relayed the following information that could only have come from Dunn: 1) Dunn was at a picnic;
12 2) a different agency had arrested a subject "in acting or something" who gave up GD; 3) GD
13 immediately knew who the subject was because he was married to a well-known actress (and was
14 a well-known musician at one point); 4) the subject had told the other agency that GD had pounds
15 of drugs; 5) Dunn told the other agency that GD would not have that quantity of narcotics; and 6)
16 the other agency did not care that GD was a BPD informant and was coming for her. [UF 26.]

17 Later that day, at 5:22 pm, completely unaware that Dunn had called and warned GD,
18 CCPD had JW call GD to attempt a controlled buy. [UF 27.] JW told GD he had cash and
19 wanted to buy drugs. GD declined to sell JW drugs, saying she was "out." [UF 28.] JW was
20 visibly surprised by GD's reaction, and immediately asked whether GD had been tipped off. [UF
21 29.] JW told Det. Koffman that it was the first time in his 3-4 years as a customer of GD's that
22 she had not sold to him. He also indicated that GD sounded uncharacteristically cold and flat on
23 the telephone. [UF 30..] Det. Koffman had to reassure JW that no one at CCPD had tipped off
24 GD. [UF 31.] CCPD also had to call off its operation given GD's reaction. [UF 32.]

25 At 5:24 pm, immediately after JW called her and asked to buy drugs, GD called Dunn.
26 [UF 33.] Dunn would later admit that GD told him that JW had just called her, but Dunn did not
27 inform anyone at BPD or CCPD of this call. [UF 34.] GD then flushed her supply of narcotics.

28 ⁷ Mercado reported this to Sgt. Misqueu in a recorded telephonic interview on April 18, 2007. [UF 26.]

1 [UF 35.] At 5:29 pm, GD called Mercado. [UF 36.] When Mercado returned the call, GD asked
2 her to run a computer search of the LASD arrest record website, where Mercado pulled up the
3 information regarding JW's arrest and release shortly before his phone call to GD. [UF 37.]⁸

4 **B. GD's Arrest**

5 Although its controlled buy with GD had failed, CCPD continued its investigation of GD.
6 On Friday, March 16, 2007, CCPD served a warrant at GD's residence, without running her name
7 through LA CLEAR or warning Dunn. [UF 38.] According to CCPD, upon being detained, GD
8 blurted out "I know it was [JW] that gave me up, I know it's [JW]." And "Yeah, I knew you were
9 with Culver City." [UF 39.] GD was arrested with 71 grams of narcotics, packaging and illegal
10 proceeds from narcotics sales, and a cell phone. The register log for GD's cell phone showed an
11 incoming phone call from "Chris Dunn" at 310-633-1888 at 2:17 p.m. on March 11, 2007 and a
12 second incoming call from "Cris" at 310-339-4967 at 2:49 p.m. on March 11, 2007. [UF 40.]

13 Following her arrest, GD was interviewed at the CCPD station by Sgt. Webb and Det.
14 Koffman. During that interview (which was videotaped), GD told CCPD that: (1) BPD let her
15 deal drugs in order to stay in touch with the dealers she was informing on [UF 41]; (2) Dunn
16 called her on Sunday, March 11 to warn her that another police agency was looking at her [UF
17 42]; (3) Dunn had previously told her on several occasions that her name was in a police
18 database, so if another jurisdiction was looking at her, Dunn would be notified [UF 43] (4) she
19 called Dunn on Tuesday or Wednesday (March 13 or March 14) to see if he wanted to monitor a
20 buy she was planning with a drug dealer Dunn was targeting [UF 44]; (5) Dunn told her he was
21 too tired and to go ahead with the buy without being monitored [UF 44]; and (6) the drugs
22 recovered at her house on March 16 were what was left from that purchase. [UF 44].

23 After GD's arrest, Det. Koffman made a "ruse" phone call to Dunn and told him that
24 CCPD was just then preparing to serve a warrant on GD. [UF 45.] Then he notified LA CLEAR,
25 which also notified Dunn. [UF46.] CCPD then had GD make a recorded call to Dunn. Dunn

26
27 ⁸ GD called Mercado several times on March 11 and told CCPD that she had Mercado run JW
28 prior to his phone call to her that day. [Webb Decl. ¶ 8.] LASD does not keep a record of the
timing of such inquiries [Lewandowski Decl., Ex. A, p. 6], but the precise timing is not material
to the instant motion.

1 answered the call and told GD he would call her back in an hour. [UF 47.] Seven minutes later,
2 Dunn called back from a "Blocked Number." GD told Dunn that she had purchased drugs from
3 the dealer Dunn was targeting and still had "quite a bit." She also said that she had gotten another
4 call from JW, asked Dunn if everything was okay, and asked what was going on with the other
5 agency. [UF 48.] Dunn told GD, "I don't know those guys, if you have, I don't know what's
6 going on, you know what I mean. If anything is going on then you need to be careful." [UF 49.]

7 The following exchange also took place:

8 Dunn: Now if you are dealing dope you can get busted, if you know what I mean.

9 If you are dealing you know you can get busted right... You understand?"

10 GD: Uh oh, in other words, clean up, right?"

11 Dunn: Yes. [UF 50.]

12 **C. The Criminal and Administrative Investigations of Dunn**

13 On March 29, 2007, Dunn notified his supervisor that he had received a call from
14 Mercado, who told him that GD had been arrested and that CCPD was investigating him. [UF
15 51.] Mercado would tell BPD that Dunn's reaction to her news was to blurt out "Oh my God, oh
16 my God," and to admit that he had called to warn GD (but claimed that doing so was part of his
17 job). [UF 52.] Dunn also told Mercado to start writing down stuff, to get GD an attorney right
18 away, that GD should stop talking to CCPD, and that he would testify on GD's behalf. [UF 53.]

19 On March 30, 2007, Dunn was transferred to the Juvenile Division while his possible
20 misconduct was investigated by BPD. [UF 54.] He was also given a direct order not to discuss
21 the investigation with anyone other than his union or legal representatives. [UF 55.] During his
22 internal affairs interviews, Dunn admitted that he spoke with both GD and Mercado after being
23 given this order, but claimed that, if he did not share details of the investigation, it would not
24 count as a discussion. [UF 56.] Dunn also admitted that he spoke with and asked questions of
25 GD and her attorney about what they knew of the investigation. [UF 57.] In addition, Mercado
26 told BPD that, following her March 29 call to Dunn, Dunn called her and told her he was not
27 supposed to speak to GD, but that he had called GD at least once anyway. [UF 58.] Mercado

1 described a long conversation between her and Dunn in which he, inter alia, followed up to ask if
2 GD had an attorney yet. [UF 59.] He also told her that he had been suspended. [Id.]

3 On April 18, 2007, after interviewing Mercado and receiving corroboration that Dunn had
4 warned GD of CCPD's investigation, Dunn was placed on paid administrative leave. [UF60.]
5 This was the last day Dunn physically worked in a BPD work environment. [UF 61.] Shortly
6 thereafter, then-Burbank Police Chief Thomas Hoefel asked LASD Sheriff Lee Baca, on behalf of
7 BPD and CCPD Chief Don Pedersen, to conduct a criminal investigation into whether Dunn had
8 warned GD about CCPD's investigation of her. [UF 62-63.] BPD's internal investigation of
9 Dunn was suspended pending the criminal investigation. [UF 64.] Sgt. Victor Lewandoski of the
10 LASD conducted the criminal investigation, concluded that there was probable cause to believe
11 Dunn had tipped-off GD and committed a crime, and presented the case to the DA's Office for
12 filing consideration on July 6, 2007. [UF 65.] Daniel Baker, the Deputy District Attorney
13 assigned to the matter, felt that the case was strong and Dunn's conduct was egregious, but
14 declined to prosecute Dunn because of the privileges applicable to GD and JW as informants. [UF
15 66.]

16 Shortly thereafter, BPD resumed its administrative investigation of Dunn. [UF 67.]
17 Multiple witnesses were interviewed and numerous documents reviewed, including the LASD's
18 criminal investigation and the phone records of Dunn, his family members, GD, CCPD and BPD
19 personnel. Dunn was interviewed by internal affairs on December 18 and 27, 2007. The internal
20 affairs investigation was completed on March 6, 2008, with Sgt. Gerard Misquez concluding that,
21 among other things, Dunn had tipped-off GD to CCPD's investigation and in so doing violated
22 California Penal Code § 148(a)(1), had been untruthful when asked about this during the internal
23 affairs investigation, and had violated a direct order not to discuss the investigation. [UF 68-69.]

24 **D. The Brady Letter and Dunn's Termination**

25 On May 9, 2008, the DA's Office issued a "Brady letter" to then-BPD Police Chief Tim
26 Stehr regarding Dunn. [UF 70.] The letter stated that the DA's Office had determined that
27 Dunn's conduct on and after March 11, 2007 constituted "an obstruction of justice, an act
28 involving moral turpitude." [UF 71.] The letter went on to state that, in both pending and closed

1 cases involving Dunn, the defense would have to be notified that Dunn had tipped-off GD to a
2 pending criminal investigation of her by the CCPD. [UF 72.] This would make Dunn useless as
3 an investigating officer and witness, as his testimony could be readily impeached. [UF 73.]

4 Dunn was terminated from the BPD on July 17, 2008. [UF 74-75.] He thereafter
5 commenced an internal administrative appeal, pursuant to the Memorandum of Understanding
6 between the City of Burbank and the Burbank Police Officers' Association ("MOU"). [UF 76.]
7 An arbitrator was selected and dates picked for the hearing. The City engaged counsel who
8 prepared for the hearing, but, on July 15, 2009, Dunn cancelled the hearing and abandoned his
9 internal appeal, giving only a few day's notice. [UF 77.]

10 Dunn filed a charge with the Dept. of Fair Employment and Housing ("DFEH") on May
11 27, 2009. [UF 82.] He filed his government tort claim with the City on May 28, 2009. [UF 83.]
12 Dunn filed this action on July 16, 2009. [UF 84.]

13 **E. Alleged Harassment**

14 As noted above, on May 27, 2009--nearly a year after he was fired and over two years
15 after he had last worked in a BPD environment--Dunn filed a DFEH charge, claiming, for the first
16 time, that he had been a victim of race-based harassment while a BPD employee and that his
17 termination was somehow related to his race. Dunn had never raised any harassment or
18 discrimination issues during his investigation or termination proceedings. [UF 78.] During his
19 deposition, Dunn identified only a limited number of comments as comprising the racial
20 harassment he supposedly experienced while working at BPD. [UF 89.] Once, a month or two
21 before April 2007, Officer Sam Anderson (who held a rank lower than Dunn's) said, "You're
22 going to be beat like WWII because you know we beat the Japs." [UF 90.] Dunn also claimed
23 that Anderson, on more than one occasion used "Jap" or "Nip" in talking about Dunn or his
24 heritage, and used the terms "gooks", "Charlie" or "fish heads" in talking about Asians generally.
25 [UF 91.] Dunn did not report any of these comments to a supervisor, nor did he say anything
26 about this to Anderson, despite being friendly with him. [UF 92-94.]

27 Dunn also identified two comments made by Sgt. Dan Yadon. When being teased about
28 almost hitting a woman in a crosswalk, Yadon said "Well its not my fault. She's Asian. She

1 could barely see at night.” and “Right Dunn. You can see right?” [UF 95.] This was in 2005 or
2 2006 [Id.] Yadon also imitated lines from an Asian character from the movie “Full Metal
3 Jacket” using an Asian accent one time, while Dunn was in SED and before July 2006. [UF 97.]

4 Dunn’s also testified about other alleged comments, which simply do not rise to the level
5 of legally harassing. First, in 2006, Officer Chris Racina told Dunn, “You know, there’s only
6 been three Asian... detectives that worked narcotics. One of them became a transvestite. The
7 other one went insane.” (Dunn understood that he was the third one.) [UF 98.] This alleged
8 observation is factual in nature, rather than being a racial slur. Second, Dunn also says that in
9 discussing a Chinese restaurant Sgt., Yadon asked “What you don’t like your people’s food?” and
10 when told Dunn was Japanese said “Well, its all the same.” [UF 96.] Third, Dunn identified
11 Officer Claudio Losacco as saying in 2003 that he did not like Dunn because he had come over
12 from the LAPD [UF 99.], and had mimicked accents of blacks and Armenians (but not of Asians).
13 [UF 100.]

14 All of the race based comments Dunn supposedly heard occurred before he was put on
15 administrative leave on April 18, 2007, over two years before he filed his DFEH Charge. [UF
16 101.] Dunn did not mention any of these comments or contend that his disciplinary action was in
17 any way motivated by his race until he filed that Charge. [UF 104.] Dunn never made any
18 complaints against any BPD officer due to their racial comments. [UF 102.]

19 **III. THE STANDARD FOR SUMMARY ADJUDICATION**

20 The policy underlying motions for summary judgment is to promote and protect the
21 administration of justice and to expedite the litigation by the elimination of needless trials. *See v.*
22 *All-Makes Overhead Doors*, 97 Cal.App.4th 1193, 1200 (2002). The City is entitled to summary
23 adjudication to a cause of action where one or more of the elements of that cause of action cannot
24 be established or there is a complete defense to that cause of action. C.C.P. § 437c(p)(2).

25 **IV. DUNN’S DISCRIMINATION AND RETALIATION CLAIMS LACK TRIABLE** 26 **ISSUES OF FACT**

27 When a defendant moves for summary judgment of a discrimination or retaliation claim
28 under the Fair Employment and Housing Act (“FEHA”), “California follows the burden shifting

1 analysis of *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792.” *Loggins v. Kaiser*
2 *Permanente Int’l* (2007) 151 Cal.App.4th 1102, 1108-1109; see also *Guz v. Bechtel Nat’l Inc.*
3 (2000) 24 Cal.4th 317, 380. Under the *McDonnell Douglas* analysis “(1) the complainant must
4 establish a prima facie case of discrimination; (2) the employer must offer a legitimate reason for
5 [its] actions; 3) the complainant must prove that this reason was a pretext to mask an illegal
6 motive.” *Mixon v. Fair Employment & Housing Comm’n* (1987) 192 Cal.App.3d 1306, 1317.
7 Whether the parties have met their respective burdens is a question of law for the court. *Caldwell*
8 *v. Paramount Unified School District* (1995) 41 Cal.App.4th 189, 201. The defendant-employer
9 only has a burden of production, and need only *produce* a legitimate reason for its actions. The
10 burden of persuasion always lies with the plaintiff-employee. *McRae v. Dept. of Corrections*
11 (2006) 142 Cal.App.4th 377, 389.

12 A. **All Claims Except Those Arising From Dunn’s Termination Are Time Barred**

13 A mandatory prerequisite to bringing a cause of action under FEHA is the timely filing of
14 a complaint with the DFEH. *Romano v. Rockwell Int., Inc.* (1996) 14 Cal.4th 479, 492. Such a
15 complaint must be filed within one year of the alleged discriminatory action. *Gov. Code* §12960;
16 *Fisher v. San Pedro Peninsula Hosp.* (1989) 214 Cal.App.3d 590, 614 n. 9. Any failure to
17 comply with these requirements amounts to a failure to exhaust administrative remedies, and
18 constitutes a jurisdictional bar to a FEHA claim. *Fisher, supra*, at 614.

19 Here, as noted above, Dunn filed his DFEH Charge on May 27, 2009. The only
20 employment action that Dunn suffered within one year of that date was the termination of his
21 employment.⁹ Accordingly, his discrimination and retaliation claims (first and third causes of
22 action) can only be premised on that adverse action.

23 B. **Dunn’s Discrimination Cause of Action Fails**

24 To state a claim for discrimination, Dunn must demonstrate that he suffered an adverse
25 employment action. *McRae v. Dept. of Corrections* (2006) 142 Cal.App.4th 377, 386. In
26 particular, an adverse employment decision “constitutes a significant change in employment

27 ⁹ Dunn had been on administrative leave since April 18, 2007 and cannot point to the investigation that lead to his
28 termination as an adverse employment action. *White v. Burlington Northern & Santa Fe R. Co.* (6th Cir. 2004) 364
F.3d 789, 803.

1 status, such as hiring, firing, failing to promote, [or] reassignment with significantly different
2 responsibilities.” *Burlington Industries, Inc. v. Ellerth* (1998) 524 U.S. 742, 761. A decision
3 must have a substantial and detrimental effect in order to be an adverse employment action.
4 *McRae, supra*, 142 Cal.App.4th at 386.

5 The only adverse employment action against Dunn (and the only non-time barred action at
6 all) was the termination of his employment. The City has produced evidence that Dunn was
7 terminated for a legitimate reason, *i.e.*, because it concluded that he 1) violated the law and BPD
8 policy by interfering with CCPD’s investigation of GD by warning her of that investigation, 2)
9 was untruthful in his internal affairs interview when he denied doing so, 3) violated a direct order
10 by discussing BPD’s and CCPD’s investigations with GD, and 4) damaged the BPD’s
11 relationship with surrounding law enforcement agencies and was no longer useful as a police
12 officer after the District Attorney’s Office placed him on its *Brady* list. [UF 5-75.] In order to
13 overcome this showing, Dunn must produce specific and substantial evidence that the City’s
14 stated reasons for his termination are pretextual. *See Guz, supra*, 24 Cal.4th at 361; *Martin v.*
15 *Lockheed Missiles & Space Co.* (1994) 29 Cal.App.4th 1718, 1735 (speculation not enough).

16 Dunn cannot meet this burden for several reasons, including because of the independent
17 evidence against him. Three other law enforcement agencies besides BPD investigated Dunn and
18 independently reached the conclusion that he illegally warned GD that CCPD was investigating
19 her—CCPD, the LASD, and the District Attorney’s Office. These investigations preceded BPD’s
20 investigation, and provided much of the evidence and formed the basis of BPD’s investigation.
21 At his deposition, Dunn admitted that he has no information to suggest that any of these agencies
22 reached its conclusion based on his race. [UF 79.] BPD reached the same conclusion. Other than
23 arguing that BPD’s investigation was not as thorough as he would like, Dunn has no evidence that
24 BPD’s investigation or conclusion was racially biased. [UF 80.] In fact, he admitted that he has
25 no evidence that the investigator who reach this conclusion, Sgt. Gerardo Misquez, was in any
26 way motivated by racial bias. Moreover, he cannot legitimately dispute that the District
27 Attorney’s decision to place him on the *Brady* list was fatal to his career as a police officer.
28

1 Indeed, BPD and the three other agencies had plenty of evidence to conclude that Dunn
2 tipped-off GD. The history of phone calls is damning by itself. When Dunn cannot get CCPD to
3 hold off on targeting GD pending his investigation, he calls Sgt. Duran. When Sgt. Duran orders
4 Dunn to give CCPD the go ahead, Dunn calls GD before Culver City, twice, and from his father's
5 phone. In addition, he called her two more times 30 minutes later from his sister's phone. The
6 use of multiple phones to call GD is telling because, throughout the day, Dunn used his BPD-
7 issued phone to make all other calls.¹⁰ Moreover, right after receiving the call from JW and
8 declining to sell drugs to him, GD immediately called Dunn. Dunn would later claim this call led
9 him to suspect that GD was onto CCPD's informant. Nevertheless, Dunn did not inform
10 anyone—not CCPD and not his supervisors at BPD—of either this phone call or his multiple
11 contacts with GD earlier in the day. His own supervisor (Sgt. Duran) was surprised about this
12 and could conceive of no legitimate reason for this behavior.

13 Further, there is the March 16, 2007 recorded phone conversation in which Dunn called
14 GD back from a blocked number, after being advised by CCPD that they were about to bust GD.
15 He essentially admitted having tipped her previously when she said that she had gotten another
16 call from JW and asked if everything was okay and Dunn responded "I don't know those guys... I
17 don't know what's going on." While speaking carefully, he basically warned her again, telling
18 her she could get busted if she sold drugs, and responding "Yes" when she asked him if she
19 should clean up now. He did all of this after being specifically told that CCPD was on its way to
20 serve a search warrant on GD.

21 Additionally, BPD had statements made to CCPD and BPD by GD admitting that Dunn
22 had tipped her, and by Mercado both corroborating that fact and indicating that Dunn had
23 admitted as much to her. Dunn simply cannot meet his burden of demonstrating that all of this
24

25 ¹⁰ When confronted with this fact during his internal affairs interview, Dunn initially stated that his cell phone
26 battery was dying. When shown that he used that cell phone throughout the day and multiple times after calling GD,
27 Dunn said that he used his BPD phone so that law enforcement personnel would recognize his call. This is also not
28 true, because BPD phones do not reveal the caller. [Stehr Decl., Ex. U, at pp. 11-12.] Similarly incredible was
Dunn's claim that he repeatedly contacted GD while off duty from a family picnic immediately after being contacted
by CCPD solely to discuss a separate investigation that had no urgency and which he had not contacted GD about for
a month. [Id. at p. 11.]

1 highly convincing evidence, which nearly got him criminally prosecuted, was a mere pretext.¹¹
2 This is particularly true given that he admittedly has no evidence that any of the individuals who
3 concluded that he did this harbored any racial bias.

4 Finally, Dunn conceded having repeated conversations with GD, GD's attorney, and
5 Mercado about the events at issue in the investigation after being specifically ordered not to
6 discuss the investigation.¹² Dunn's contention that he did not violate the order because just asked
7 questions and gathered information, but did not reveal anything, is a disingenuous play on words.
8 Dunn's violation of a direct order not to discuss the investigation with GD constitutes
9 insubordination which itself warrants his termination. *Caveness v. State Personnel Bd.* (1980)
10 113 Cal.App.3d 617, 631; *Flowers v. State Personnel Board* (1985) 174 Cal.App.3d 753, 761
11 (termination of the employment of a public employees, including police officers, is justified by
12 insubordination). Dunn's dishonesty during his internal affairs interview is likewise an
13 independent reason for termination. "Honesty, credibility and temperament are crucial to the
14 proper performance of an officer's duties. Dishonesty is incompatible with the public trust."
15 *Talmo v. Civil Service Commission* (1991) 231 Cal.App.3d 210, 231 (termination upheld for
16 deputy who lied to his superiors to cover up his misconduct). See, also, *Paulino v. Civil Service*
17 *Comm'n* (1985) 175 Cal.App.3d 962, 972 (false report to take sick leave); *Kolender v. San Diego*
18 *County Civ. Serv. Comm'n* (2005) 132 Cal.App.4th 716, 721 (lying re misconduct of others);
19 *Haney v. City of Los Angeles* (2003) 109 Cal.App.4th 1, 12 (false reports re on-duty barbecue).

20 **C. Dunn Has No Retaliation Claim**

21 To state a *prima facie* claim for retaliation under FEHA, Dunn must prove that: (1) he
22 engaged in a protected activity; 2) he was subsequently subjected to an adverse employment
23 action; and 3) there was a causal link between the two. *Flait v. North American Watch*
24 *Corporation* (1992) 3 Cal.App.4th 467, 476; *McRae v. Dept. of Corrections* (2006) 142

25 _____
26 ¹¹ Dunn may contend that the fact that he disputes some of this evidence creates a triable issue of fact sufficient to
27 defeat summary judgment. This is not true under the circumstances here. The City does not have to prove that Dunn
28 actually tipped-off GD. Dunn must prove that the overwhelming evidence that he did so is a mere sham and a pretext
to cover up illegal race discrimination. Dunn has no evidence to meet this burden.

¹² In his first interview, Dunn denied talking to GD. In his second interview, he contradicted himself and admitted
having several conversations with GD after being ordered not to do so. [Ex. U to the Stehr Decl., at pp. 15-16.]

1 Cal.App.4th 377, 386. Dunn cannot establish the first and third elements of a *prima facie*
2 retaliation case, and, thus, the Court should grant summary adjudication of Dunn's Third Cause of
3 Action for Retaliation.

4 **1. Dunn Did Not Engage In Any Protected Activity**

5 As a threshold matter, Dunn did not engage in protected activity upon which to predicate
6 his FEHA retaliation claim. Protected activity under FEHA is essentially defined as complaining
7 about conduct made illegal by that statute. *Fisher, supra*, 214 Cal.App.3d at 615. Here, Dunn's
8 Complaint alleges that he was terminated in retaliation for his alleged complaints about various
9 officers. However, Dunn did not file any complaints of discrimination while with the BPD, and,
10 at deposition, he acknowledged that he never complained of conduct made illegal by FEHA. [UF
11 107. Dunn's testimony establishes that he did not complain about the officers who allegedly
12 made racial comments in the workplace [UF 94, 102], and suggests that, at most, he had some
13 informal discussions with superiors about personality or work-related conflicts, and listened when
14 other officers talked about potential discrimination. [Pelletier Decl., Ex. GG, at 139:1-142:10;
15 Ex. HH at 196:1-198:4, 201:17-206:13.]

16 **2. There Is No Nexus to Show Retaliatory Intent**

17 Dunn's retaliation claim also fails because of his inability to show a causal link between
18 any protected conduct and his termination. A causal link is demonstrated by showing a closeness
19 in time and personal relationship between the protected complaint and the alleged retaliatory
20 action. *Sada v. Robert F. Kennedy Medical Center*. (1997) 56 Cal.App.4th 138, 156-157
21 (complainant terminated two days after defendants learned of complaint); *Flait v. NAWC* (1992) 3
22 Cal.App.4th 467, 478 (plaintiff fired by same executive he confronted). Moreover, the defendant
23 must know of the complaint before the alleged retaliation takes place. *Doe v. Capital Cities*
24 (1996) 50 Cal.App.4th 1038, 1053; *Sada, supra*, 56 Cal.App.4th at 156-157.

25 Again, other than arguing the BPD's investigation was not as thorough as he would like,
26 Dunn has no evidence that BPD's investigation of him or his resultant termination were
27 retaliatory. [UF 79-81.] Both the person who conducted the investigation of Dunn (Sgt.
28 Misque) and the person who made the decision to terminate him (Chief Stehr) have denied

1 having any knowledge of any complaint of discrimination, retaliation or harassment by Dunn
2 (which is not surprising because Dunn never made any such complaints) [UF 81.] Again,
3 considering that multiple other agencies concluded that Dunn illegally tipped his informant, and
4 he was nearly criminally prosecuted, there is simply no causal link between any supposed
5 protected act and Dunn's termination. Accordingly, the Court should summarily adjudicate
6 Dunn's third cause of action for retaliation in favor of the City.

7 **V. DUNN FAILED TO EXHAUST ADMINISTRATIVE REMEDIES**

8 Once a plaintiff begins to pursue an administrative remedy, he must exhaust and
9 ultimately prevail in overturning the administrative action before he can proceed on a state law
10 FEHA claim. *Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61, 70; *Williams v. Housing*
11 *Authority of the City of Los Angeles* (2004) 121 Cal.App.4th 708, 724-726 (employee who
12 commences administrative process must pursue "internal grievance process through the final
13 stage of judicial mandamus review" before bringing FEHA claim). Even for FEHA claims, once
14 Dunn dives into the administrative pool, he must successfully swim to the other side, or his
15 claims will sink. *Miller v. County of Santa Cruz* (9th Cir. 1994) 39 F.3d 1030, 1038 ("California
16 has made it quite clear that a discharged civil servant who elects an administrative forum for
17 review of his or her termination must succeed in overturning that administrative decision through
18 the judicial mandamus review procedure prior to filing a suit for damages on claims arising out of
19 the termination." citing *Swartzendruber v. City of San Diego* (1992) 3 Cal.App.4th 896, 905-906).

20 Here Dunn initiated an administrative appeal process challenging his termination, and
21 proceeded with it right up until he abandoned it at the last minute. [UF 310-313.] The City still
22 had to pay for the arbitrator's fee as if the hearing had been held. [Pelletier Decl., Ex. KK.]
23 Dunn clearly commenced the internal appeal and never successfully completed it. Thus, any
24 claims arising out of his termination (all but his harassment claims) fail for this reason alone.

25 **VI. GOVERNMENT CODE § 821.6 IMMUNITY BARS DUNN'S CLAIMS**

26 *Government Code* § 821.6 grants a public employees immunity from liability "for injury
27 caused by his instituting or prosecuting any judicial or administrative proceeding within the scope
28 of his employment, even if he acts maliciously and without probable cause." *See also, Kemmerer*

1 v. *County of Fresno* (1988) 200 Cal.App.3d 1426, 1436-37. The term "administrative
2 proceeding" in Section 821.6 is construed broadly to encompass not only administrative hearings,
3 but also the City's investigation of Dunn which is "an essential step to the institution of the
4 disciplinary proceeding" *Kemmerer, supra*, 200 Cal.App.3d at pp. 1431, 1436-37; *Baughman*
5 v. *State of California* (1995) 38 Cal.App.4th 182, 192. In this action, Dunn has not sued any BPD
6 employees, but under *Gov. Code* § 815.2(b), since the City's employees are immune from
7 liability for their actions related to the investigation and termination of Dunn, the City is also
8 immune from liability. Public policy favors the application of immunity in this and other similar
9 cases. Supervisors in public employment must be able to perform their functions "without the
10 overhanging threat of legal action from employees who become subject to discipline."
11 *Kemmerer, supra*, 200 Cal.App.3d at 1439. In the end, it is better to leave unredressed the
12 wrongs allegedly done by a few overzealous officers than to subject cities to the constant threat of
13 legal retaliation. *Amylou R. v. County of Riverside* (1994) 28 Cal.App.4th 1205, 1213.

14 Here, the only actions that are not barred by the statute of limitations are related to the
15 investigation of Dunn's claimed misconduct and administrative disciplinary process which
16 resulted in Dunn's termination. The City is immune from liability for these actions. Therefore,
17 summary judgment should be granted.

18 **VII. DUNN'S HARASSMENT CLAIMS ARE MERITLESS**

19 **A. All Harassment Claims Are Time Barred**

20 A mandatory prerequisite to bringing a cause of action under FEHA is the timely filing of
21 a complaint with the DFEH, within one year of the alleged discriminatory action. *Romano, supra*,
22 14 Cal.4th at 492; *Gov. Code* §12960. Any failure to comply with these requirements amounts to
23 a failure to exhaust administrative remedies, which is a jurisdictional bar to Dunn's FEHA claims.
24 *Fisher, supra*, at 614.

25 As discussed in greater detail in Section VII.B below, Dunn must show that he
26 experienced a hostile workplace environment to support an harassment cause of action. *Murray*
27 v. *Oceanside* (2000) 79 Cal.App.4th 1338, 1356, 1361. Dunn last worked for BPD on April 17,
28 2007, when he was placed on administrative leave. [UF 101.] He filed his DFEH claim more

1 than two years later on May 27, 2009. [UF 105.] Therefore, since Dunn was not working for the
2 City during the one year period before he filed his DFEH claim, he could not have experienced
3 any workplace harassment at the City during that time. Dunn's second cause of action for
4 harassment therefore fails as a matter of law for this reason alone.

5 B. Summary Judgment Of The Harassment Claim Is Warranted Because The
6 Few Minor Incidents Of Harassment Were Not Severe And Pervasive

7 Even if Dunn can get past his statute of limitations problem, to state a claim of
8 harassment, Dunn must show harassment that was so severe and pervasive that it created an
9 abusive working environment. *Murray, supra*, 79 Cal.App.4th at 1356, 1361. In addition, he
10 must show that the harassment was "because of" his race. *Murray, supra*, at 1356.

11 California courts look to the federal courts and Title VII for guidance on harassment
12 claims. *Fisher, supra*, 214 Cal.App.3d at 606. To establish pervasiveness, Dunn must show an
13 environment that was so extreme as to amount to a change in the terms or conditions of his
14 employment. *Farragher v. City of Boca Raton* (1998) 524 U.S. 775, 787. The standard is meant
15 to be demanding to ensure that the courts do not become the enforcers of a general civility code
16 for the American workplace. *Oncale v. Sundowner Offshore Services, Inc.* (1998) 523 U.S. 75,
17 81. Hostile words or conduct based solely on personal animosity, personality conflicts, or other
18 disagreements not related to Dunn's race, are simply not actionable. *Morris v. Oldham County*
19 *Fiscal Court* (6th Cir. 2000) 201 F.3d 784, 790 (animosity); *Davis v. Coastal Intern. Sec., Inc.*
20 (D.C. Cir. 2002) 275 F.3d 1119, 1123 (grudge).

21 In determining what constitutes "sufficiently pervasive," the conduct must not be
22 occasional, isolated, sporadic, or trivial. *Fisher, supra*, 214 Cal.App.3d at 610. Moreover, unless
23 Dunn can show the loss of a tangible job benefits due to the harassment, he must make a
24 commensurately higher showing that the allegedly harassing conduct was "destructive of the
25 working environment." *Id.* Although no single factor is required, the courts look to the
26 frequency of the harassing conduct, its severity, whether it is physically threatening or
27 humiliating or merely offensive, and whether the conduct unreasonably interferes with workplace
28 performance. *Harris v. Forklift Systems, Inc.* (1993) 510 U.S. 17, 22.

1 Here, as noted above, Dunn identified a limited number of instances of supposedly
2 harassing behavior, most of which is not actionable harassment. For example, Officer Losaco's
3 purported comments about not liking former LAPD officers is not harassment against Dunn's
4 race or ethnicity. In addition, Sgt. Yadon's alleged reaction to Dunn's not wanting to go to a
5 Chinese restaurant is not harassing, nor is his opinion statement about the similarity of Japanese
6 and Chinese cuisines. Similarly, without more, Racina's single statement observing that two
7 previous Asian employees had respectively become a transvestite or had mental problems also
8 fails to rise to this demanding standard.

9 This leaves three specific, but minor, incidents over a two to three year period, and a
10 general assertion against one officer, as the bases for Dunn's harassment claim. The first of these
11 incidents occurred in 2005 or 2006, when Sgt. Yadon said he almost ran over an Asian woman in
12 a crosswalk because "She could barely see at night." Many months to a year or more later in July
13 2006, in another single incident, Yadon also imitated a famous line from an Asian character from
14 the movie "Full Metal Jacket" using the character's Asian accent. Approximately 8 or 9 months
15 later in 2007, during a team competition at the shooting range, Officer Anderson told Dunn
16 "You're going to be beat like WWII because you know we beat the Japs." [UF 90.] Each of
17 Dunn's three specific isolated incidents are separated from each other by at six months to a year.
18 This is far too sporadic to support a harassment claim.¹³ *Fisher, supra*, 214 Cal.App.3d at 610.

19 Dunn also claims that Anderson—a subordinate officer--on more than one occasion used
20 "Jap" or "Nip" in talking about Dunn or his heritage, and has used the terms "gooks", "Charlie"
21 or "fish heads" in talking about Asians generally. [UF 91.] Dunn did not report any of these
22 comments to a supervisor. [UF 94.] Nor did he tell Anderson, with whom he was admittedly
23 friends, that he felt the comments were inappropriate. [UF 93.] Anderson made these comments
24 while on working with Dunn on patrol from 2001-2003, and while they were on SRT together.
25 [UF 92.] SRT was an extra assignment in addition to Dunn's regular job, with only occasional
26

27 ¹³ Dunn offered vague deposition testimony of other racial comments being made at roll call while he was on patrol
28 (from 2001-2003), but the only specific instance he could provide resulted in the Sergeant admonishing the officer at
fault, whom Dunn could not even remember. [Pelletier Decl., Ex. GG, pp. 166:19-169:18.] His vague claims of
accent mimicry not directed at him or Asians is similarly nonpersuasive.

1 training sessions, and thus limited contact with Anderson. [UF 93.]

2 In similar cases, courts have held that the alleged harassment was simply not severe or
3 pervasive. In *Manatt v. Bank of America, NA* (9th Cir. 2003) 339 F.3d 792, 798-799, the Ninth
4 Circuit held that the alleged harassment of an Asian plaintiff was not severe or pervasive for
5 “simple teasing” and “offhand comments.” The plaintiff overheard jokes using the phrase “China
6 man” and a reference to China and communism. But “on only a couple of occasions did
7 [plaintiff’s] co-workers or supervisor direct their racially insensitive ‘humor’” at plaintiff. Once,
8 several employees pulled their eyes back with their fingers for plaintiff in an attempt to imitate or
9 mock the appearance of Asians. See also *Johnson v. Bunny Bread* (8th Cir. 1981) 646 F.2d 1250,
10 1257 (sporadic ethnic slurs not actionable); *Cariddi v. Kansas City Chiefs Football Club* (8th Cir.
11 1977)(supervisor’s use of “dago” and “mafia” regarding Italians not actionable).

12 **C. Dunn Did Not Report The Alleged Harassment**

13 Moreover, the City is not liable for harassment by its employees if it acted reasonably and
14 responsibly upon receiving a complaint. *Swenson v. Potter* (9th Cir. 2001) 271 F.3d 1184, 1192.
15 Indeed, the City’s liability for harassment runs only from the time it knew, or should have known,
16 of the harassment. *Id.* To prevail, Dunn must show that the City knew or should have known of
17 the harassment by Dunn’s co-workers. *Ferris v. Delta Air Lines, Inc.* (2d Cir. 2001) 277 F.3d
18 794, 804 (knowledge shown by earlier complaints); *Waltman v. International Paper Co.* (5th Cir.
19 1989) 875 F.2d 468, 471 (sexually explicit pictures posted in common areas). This knowledge
20 must be shown at the management level of the City, not a mere supervisory employee in the labor
21 force. *Huston v. Procter & Gamble Paper Products Corp.* (3d Cir. 2009) 568 F.3d 100, 105, fn.
22 4. Here, Dunn never reported the alleged race-based comments of his colleagues to management.
23 [UF __] Thus, his harassment claim fails for this additional reason.

24 **VIII. DUNN HAS NO BASIS FOR A FEHA FAILURE TO PREVENT CLAIM**

25 Dunn’s fourth cause of action is for failure to take reasonable steps to prevent harassment,
26 discrimination and retaliation in violation on *Gov. Code* § 12940(j)(1) and (k). These claims fail
27 as a matter of law unless Dunn can prove that he was a victim of discrimination. *Trujillo v. North*
28 *Co. Transit Dist.* (1998) 63 Cal.App.4th 280, 289 (no action lies for failure to prevent if no

1 discrimination occurs). Since Dunn's harassment, discrimination and retaliation claims fail for
2 the reasons stated above, the City cannot be liable for failing to prevent such conduct.

3 **IX. DUNN CANNOT SHOW TRIABLE ISSUE OF A POBRA VIOLATION**

4 Dunn's final cause of action, labeled the "Sixth Cause of Action," is for violation of the
5 Police Officers Bill of Rights Act, *Gov. Code* §§ 3300 et seq. ("POBRA"). [FAC ¶¶ 60-70.] This
6 claim fails for several reasons.

7 **A. Dunn's POBRA Cause of Action is Time-Barred**

8 No action for money or damages may be brought against a public entity unless a written
9 claim for damages ("tort claim") is presented to that entity within six months after the alleged
10 wrongful acts occurred. *Gov. Code* §§ 905, 911.2, 945.4; *Colores v. Board of Trustees* (2003)
11 105 Cal.App.4th 1293, 1319-1320 (wrongful termination). The statutory time limit is mandatory,
12 *City of San Jose v. Superior Court* (1974) 12 Cal.3d 447, 454, and applies to POBRA claims.
13 *Lozada v. City and County of San Francisco* (2006) 145 Cal.App.4th 1139, 1153. Here, Dunn
14 filed his claim with the City on May 28, 2009, more than ten months after his termination on July
15 17, 2008. [UF 300.]

16 **B. Dunn's Tort Claim Did Not Allege A POBRA Violation**

17 It is also well settled law that if a plaintiff is relying upon more than one legal theory of
18 recovery, "each cause of action [in the complaint] must have been reflected in a timely claim,"
19 which must include the same defendants, causes of action, and factual allegations which are
20 asserted in a subsequent complaint. *Fall River Joint Unified School Dist. v. Sup. Ct.* (1988) 206
21 Cal.App.3d 431, 434; *Okoli v. Lockheed* (1995) 36 Cal.App.4th 1607, 1617. Here, Dunn's tort
22 claim makes no mention of any claim under POBRA. [UF 3027.] Nor does it allege any facts
23 that constitute a violation of POBRA. [Id.]

24 **C. Dunn Cannot Produce Triable Issue Of Any POBRA Violations**

25 The only substantive provision of POBRA cited in the FAC [¶ 64] is *Gov. Code* § 3304,
26 which prohibits retaliation against officers *for exercising rights under POBRA*. Each of Dunn's
27 alleged POBRA violations are improper attempts to re-allege racial retaliation under POBRA
28

1 instead of FEHA. Dunn's written discovery responses state that he has "no information or belief"
2 of any "other practices" besides retaliation that violate POBRA. [UF 303.]

3 POBRA does not create an alternate remedy for FEHA claims. It deals with procedural
4 rights which police officers enjoy in cases where possible misconduct is investigated, discipline is
5 imposed, or promotions are denied. *Perez v. City of Los Angeles* (2008) 167 Cal.App.4th 118,
6 122. POBRA does not prohibit a City from terminating a police officer for misconduct, including
7 lying. *Crawford v. City of Los Angeles* (2009) 175 Cal.App.4th 249, 257. Dunn's self-serving
8 invocation of vague public policy does not convert POBRA into an alternate anti-discrimination
9 statute. Even if it could, such a claim would fail for the same reasons that Dunn's FEHA claims
10 fail.

11 **VI. CONCLUSION**

12 For all of the foregoing reasons, summary judgment should be granted in favor of the City
13 of Burbank and against Dunn. Alternatively, the City requests summary adjudication in its favor
14 for each causes of action that presents no disputed issue of fact or is barred as a matter of law.

15 Dated: May 12, 2010

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Kristin A. Pelletier

17 By: 

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Attorneys for Defendant
City of Burbank

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